Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

PAGE

Appendix A (Opinion of the Court of Appeals of the State of New York, May 1, 1979) 1a

Appendix B (Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, July 27, 1978) 16a

Appendix C (Opinion of the New York Supreme Court, Albany County, February 17, 1978) 24a

Appendix D (Final Judgment of the Court of Appeals of the State of New York, May 1, 1978) 29a

Appendix E (Opinion of the Public Service Commission of the State of New York, February 25, 1977) 31a

Appendix F (Order of the Public Service Commission of the State of New York, February 25, 1977) 57a

Appendix G (Order of the Public Service Commission of the State of New York Denying Petitions for Rehearing, July 14, 1977) 59a

Appendix H (Notice of Appeal to the Supreme Court of the United States, June 26, 1979) 72a

Appendix A

Opinion of the Court of Appeals of the State of New York, May 1, 1979

STATE OF NEW YORK
COURT OF APPEALS

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3 No. 150

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

VS.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

VS.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

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3 No. 151

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Appellant,

VS.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

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(150) (151) JOSEPH D. BLOCK & PETER GARAM, NY City, *for appellant* in (150).

Appendix A

TELFORD TAYLOR, WALTER A. BOSSERT, JR., & DAVISON W. GRANT, NY City, *for appellant* in (151).

HOWARD J. READ & PETER H. SCHIFF, Albany, *for respondent* in each matter.

COOKE, Ch. J.:

We determine here whether the Public Service Commission exceeded its statutory authority or impinged upon First Amendment rights by restricting certain advertising and promotional practices of public utilities. For the reasons outlined, we hold that the Public Service Commission was within its authority in imposing the restrictions, and that petitioners' expressional rights were not unconstitutionally impaired.

I

Respondent, New York Public Service Commission, exercises regulatory and supervisory powers over public utilities licensed to operate in the State (see Public Service Law, §§5, 66). In 1973 the Commission, reacting to the Arab oil embargo, prohibited electric corporations "from promoting the use of electricity through the use of advertising, subsidy payments * * * or employee incentives". Although the immediate crisis created by the embargo dissipated, no repeal of the promotional ban was effected by the Commission. Then, in July of 1976, the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices". Petitioners, Central Hudson Gas & Electric Corporation and Consolidated Edison Company of New York, Inc., as well as other interested parties, responded to the notice, arguing for relaxation of the promotional ban on both policy and constitutional grounds.

Appendix A

After reviewing the comments received and conducting its evaluation of the problem, the Commission rendered a decision on February 25, 1977 entitled "Statement of Policy on Advertising and Promotional Practices of Public Utilities". In its statement, the Commission concluded "that the existing ban on promotion of electricity sales should be continued". Its reasoning for continuation of the prohibition was succinctly stated: "[C]onservation of energy resources remains our highest priority * * *. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."

That same day, the Commission released an order addressing the topic of utility bill inserts. By that order, the Commission directed all utilities subject to its jurisdiction to "discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy". This restriction, too, was partially explained in the Commission's policy statement: "We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues * * * is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the utility's message."

Dissatisfied with the decision, Central Hudson and Con Edison petitioned for a rehearing, which was denied by the Commission on July 14, 1977. Central Hudson then commenced an article 78 proceeding challenging the advertising and insert bans. Con Edison instituted a separate proceeding in which it objected to only the billing insert measure. Special Term, in brief opinions, ruled that while the Commission had power to impose the promotional advertising

Appendix A

restriction, it lacked authority to prohibit the use of bill inserts. On appeal, the Appellate Division modified, sustaining both branches of the Commission's determination.

II

At the outset, petitioners challenge the Commission's statutory authority to regulate the content of billing envelopes and the promotional advertising practices of public utilities. It is, of course, a fundamental postulate of administrative law that the Public Service Commission, like other agencies, is possessed of only those powers expressly delegated by the Legislature, together with those powers required by necessary implication (see, e.g., *Suffolk County Builders Association, Inc. et al* v *County of Suffolk, et al,* —— NY2d —— [decided 4/5/79]; *Matter of National Merchandising Corp.* v *Public Serv. Comm.,* 5 NY2d 485, 489; cf. *Matter of Bates* v *Toia,* 45 NY2d 460, 464). Nevertheless, the absence of explicit statutory authorization need not be fatal to a given assertion of regulatory power by the Commission. For, as we have recognized previously, the Legislature on occasion broadly declares its will, specifying only the goals to be achieved and policies to be promoted, while leaving the implementation of a program to be worked out by an administrative body (see, e.g., *Matter of Sullivan County Harness Racing Assn.* v *Glasser,* 30 NY2d 269, 276; cf. *Matter of Bates* v *Toia, supra*). In such cases, the sheer breadth of delegated authority precludes a precise demarcation of the line beyond which the agency may not tread. What is called for, rather, is a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment (cf. *Matter of Broidrick* v *Lindsay,* 39 NY2d 641, 646).

Appendix A

In the context of this case, without doubt, the Legislature has conferred vast power upon the Public Service Commission (see, e.g., Public Service Law, §§4, 5, 65, 66; cf. *Matter of Public Serv. Comm. of State of N.Y.* v *Jamaica Water Supply Co.,* 42 NY2d 880, affg 54 AD2d 10). Indeed, the Commission is expressly endowed with "all powers necessary or proper to enable it to carry out the purposes of" the Public Service Law (Public Service Law, §4, subd 1). Added to this is the Commission's specific power of "general supervision of all gas corporations and electric corporations" and "all gas plants and electric plants" (Public Service Law, §66, subd 1).

In light of current exigencies, one of the policies of any public service legislation must be the conservation of our vital and irreplaceable resources. The Legislature has but recently imposed upon the Commission a duty "to encourage all persons and corporations * * * to formulate and carry out long-range programs * * * [for] the preservation of environmental values and the conservation of natural resources" (Public Service Law, §5, subd 2). Implicit in this amendment is a legislative recognition of the serious situation which confronts our State and nation. More important, conservation of resources has become an avowed legislative policy embodied in the Commission's enabling act (see, also, *Matter of New York State Council of Retail Merchants* v *Public Serv. Comm. of State of N.Y.,* 45 NY2d 661, 673-674).

It necessarily follows, therefore, that the Commission possesses ample power to prescribe reasonable measures designed to prevent wasteful consumption or unneeded expansion of utility services. By prohibiting promotional advertising of electric power, the Commission has taken precisely such a step. In its expertise, the Commission could have reasonably concluded that promotional advertising might tend to increase injudicious and unnecessary con-

sumption of electrical power. Given this, the authority for the advertising ban becomes apparent.

Nor did the Commission exceed its jurisdiction by prohibiting the inclusion of inserts in utility billing envelopes. The Legislature has granted the Commission express authority "to fix and alter the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity * * *" (Public Service Law, §66, subd 12-a).[1] Incident to that authority and in the same subdivision it is provided that the "commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy". Thus, the Legislature has authorized the Commission to regulate not only the format and informational content of the bill itself but the entire billing communication. Petitioners invite us to read these provisions narrowly, restricting the Commission's jurisdiction to the actual billing instrument itself rather than extending it to the entire contents of the billing envelope. This artificial distinction must be rejected. By necessary implication, the statute, if it is to amount to more than an empty adage, must provide the Commission with authority to oversee the distribution of bill inserts. Were the agency's

[1] Added by Laws of 1977, chapter 527, approved Aug. 1, 1977. In a case such as this one, in which the effectiveness of the Public Service Commission's prohibitions has been judicially stayed by interim orders during the course of this litigation such that they have not yet attained practical vitality, we have no difficulty in applying to this appeal the principle that we must decide the case on the basis of the law as it exists today. (*Strauss* v *University of the State of New York*, 2 NY2d 464, 465.) It would be but a futile exercise to annul the PSC determination on the basis of prior law only to have the agency validly repromulgate its order under the recent amendment.

power construed to extend only to the bill itself, control over informational content and format "to assure simplicity and clarity" could be severely hampered if not totally undermined. While the bill might be simple and clear, utilities could literally inundate consumers with a morass of irrelevant and conflicting data, forms, and pamphlets, causing confusion and oversight. Indeed, granting the utilities unfettered discretion to include all materials would negate the legislative goals of simplicity and clarity. It is difficult to conceive a legislative intent to permit such a disordered pattern. A more acceptable alternative is an interpretation of the statute empowering the Commission to regulate the billing process as a whole.

This construction becomes all the more reasonable when viewed in the context of the entire regulatory scheme. Rather than restricting the PSC's authority, the Legislature has invested that agency with all powers needed to carry out the purposes of the Public Service Law, as well as power to supervise generally the operation of electric and gas corporations and electric and gas plants (Public Service Law, §4, subd 1; §66, subd 1). In view of the expansive definitions of electric and gas plants (Public Service Law, §2, subds 10, 12), the Commission's supervisory authority must be taken to extend to those "useful and necessary services [and property] which facilitate" or are used in connection with the "manufacture, conveying, transportation, distribution, sale, or furnishing" of utility power (*Matter of National Merchandising Corp.* v *Public Serv. Comm.*, 5 NY2d 485, 490-491; Public Service Law, §2, subds 10, 12). Control of the billing procedure, a process necessarily adjunct to the furnishing of utility service, thus fits neatly into the PSC's supervisory role. This supervisory power, combined with the more specific billing regulatory authority,

provides ample justification for Commission oversight of billing envelope content.

To summarize, the Public Service Commission is possessed of sufficient statutory power to prohibit the promotional advertising of electricity and to prescribe the content of electric and gas corporation consumer billing envelopes.

III

The Commission's actions being within the limits of its delegated authority, petitioner's First Amendment contentions must be addressed. The constitutional attack is directed at both the outright prohibition of promotional advertising and the ban on bill enclosures dealing with controversial topics.

Analysis in the First Amendment area proceeds on one of two tiers, depending upon the nature of the restriction which government has imposed (see, e.g., Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv L Rev 1482). At one level, government regulation designed to suppress traditional communicative activity because of its content or potential impact is subject to the most rigorous scrutiny. Absent some compelling justification, such as a likelihood that speech will incite "imminent lawless action", content-oriented restrictions may not stand (*Brandenburg* v *Ohio,* 395 US 444, 447; see *Hess* v. *Indiana,* 414 US 105; *United States* v *O'Brien,* 391 US 367, 376-377; see, generally, Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan L Rev 719). On the second tier are those governmental measures which, although not directly aimed at all communication, inhibit the free flow of information or ideas. The validity of such a restraint is gauged by balancing the

various competing interests, with due regard for the status of First Amendment rights in our constitutional scheme. Thus, so long as a facially neutral regulation does not unduly constrict the exercise of protected rights, it is not unconstitutional (compare *Buckley* v *Valeo,* 424 US 1, 60-84, with *Schneider* v *State,* 308 US 147; see, generally, Note, Less Drastic Means and the First Amendment, 78 Yale L J 464).

A

In the present case, the prohibition on billing inserts, which was designed to vindicate the privacy rights of utility customers, constitutes at best an indirect restraint upon expressional activity. It extends not to all speech of a prescribed content, but only to one manner of communication. No one viewpoint is singled out for special treatment, nor is the general right to express ideas in other forums effected. In short, the PSC is concerned with but one particular means of expression, and then only to a limited extent.

It is well settled that government may impose reasonable restrictions upon the time, place and manner of communication (see, e.g., *Grayned* v *City of Rockford,* 408 US 104, 115-117; *Kovacs* v *Cooper,* 336 US 77; *Cox* v *New Hampshire,* 312 US 569, 575). To constitute a valid time, place and manner restriction, a regulation must be content neutral, supported by a significant governmental interest, and not foreclose alternative channels of expression (e.g., *Va. Pharmacy Bd.* v *Va. Consumer Council,* 425 US 748, 771). Respondent PSC urges that its billing insert decree satisfies these criteria. It is correct.

There is no doubt but that the regulation leaves open numerous alternative means of communication. On its face, the ban only reaches expressional activity conducted through the billing envelope. Whatever other modes of

speech were open to utilities prior to the effective date of the Commission order remain available. That the cost of utilizing these alternative channels may be higher is not determinative, especially where, as here, petitioner has wholly failed to demonstrate that it will be effectively precluded from exercising its rights (see, e.g., *Kovacs* v *Cooper,* 336 US 77, 88-89).

In a similar vein, the ban unquestionably fosters an important governmental interest. Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company. Whatever materials are enclosed in the envelope are destined to come in contact with the addressee. When the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word * * * a different or more preferred status because [it is] sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another" (*Rowan* v *Post Office Dept.,* 397 US 728, 737; see, also, *Martin* v *Struthers,* 319 US 141; Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum L Rev 960). A governmental agency such as the PSC may take appropriate steps to protect this privacy right of its constituents (*Kovacs* v *Cooper, supra* at pp 86-89; *Cohen* v *California,* 403 US 15, 21-22; see, also, *Public Utilities Comm'n* v *Pollak,* 343 US 451, 466-469) [Douglas, J. dissenting]).

Finally, the regulation, properly viewed, is not content oriented. True, the directive sweeps within its strictures only those bill inserts treating controversial topics. But it does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue. In short, the restriction endeavors, in an objective and evenhanded manner, to limit billing insert materials to the innocuous and noncontroversial. Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment (*Erznoznik* v *City of Jacksonville,* 422 US 205, 209; see *Greer* v *Spock,* 424 US 828, 838-839; *Lehman* v *City of Shaker Heights,* 418 US 298, 302-304; see, Tribe, American Constitutional Law, §12-21, at pp 690-691, & n 21).

Accordingly, because it satisfies the above criteria, the PSC order banning bill inserts constitutes a valid time, place and manner regulation.

B

To be contrasted is the Commission directive proscribing all promotional advertising of electric service. Rather than an oblique inhibition, this order works a direct curtailment of expressional activity: an entire category of speech is prohibited because of its potential impact upon the society. As noted, content-oriented regulations have been subjected to an exacting standard of review, the precise level of that standard bing determined by reference to the nature of the communication.

Until recently, communication in the commercial sphere would not have been accorded any First Amendment recognition (compare *Valentine* v *Chrestensen,* 316 US 52, with *Bigelow* v *Virginia,* 421 US 809). While now entitled to a

measure of constitutional protection, the full panoply of safeguards afforded more traditional communications does not necessarily attach (*Ohralik* v *Ohio State Bar Assn.*, 436 US 447, 456). Our task, therefore, is to apply the emerging principles of the commercial speech doctrine to the present context.

A common theme sounding in commercial speech cases is the notion that society, as a whole, "may have a strong interest in the free flow of commercial information" (*Va. Pharmacy Bd.* v *Va. Consumer Council,* 425 US 748, 764, 765; see, e.g., *Linmark Associates, Inc.* v *Willingboro,* 431 US 85, 92; *Bates* v *State Bar of Arizona,* 433 US 350, 364-365). In a market system such as ours, allocation of resources is largely accomplished through a confluence of private economic decisions. Society possesses a vital interest in ensuring that these economic decisions are consummated in an intelligent, well informed atmosphere, and the free flow of commercial information is indispensable to the attainment of this goal (e.g., *Va. Pharmacy Bd.* v *Va. Consumer Council, supra,* at p 765).

The individual consumer, too, has a stake in the availability of commercial information. To many, knowledge of the price and availability of goods and services takes on an importance overshadowing even the most urgent political debate. Especially in these days of rapidly fluctuating prices, the free flow of commercial information plays a central role in consumer decision making. Indeed, it could mean the difference between enjoyment or nonenjoyment of basic necessities (see, *Va. Pharmacy Bd.* v *Va. Consumer Council, supra,* at p 764).

Recognition of these interests accounts, in large measure, for the protections extended commercial speech. In a competitive market, information concerning the availability and

price of goods and services is essential to consumers. Analysis of precedent bears out this observation. In *Va. Pharmacy Bd.* v *Va. Consumer Council* (425 US 748, *supra*), for example, the State sought to prohibit advertising of prescription drug prices. Acknowledging the State's strong interest in ensuring the professionalism of pharmacists, the Supreme Court nonetheless found the societal and individual benefits flowing from price advertising in this competitive industry to be superordinate: "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. * * * But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering" (Id., at p 770). Similarly, in *Bates* v *State Bar of Arizona* (433 US 350, *supra*), a disciplinary rule restricting advertising by attorneys was invalidated. In so doing, the court again highlighted the role of commercial information in a free enterprise economy, commenting that "such speech serves individual and societal interests in assuring informed and reliable decisionmaking" (Id., at p 364). The various justifications offered in support of a ban on attorney advertising were demed insufficient to override these interests (Id., at pp 366-379).

By the same token, where the importance of the free flow of commercial information is diminished, either because of market structure of the industry or hazards associated with a particular means of communication, First Amendment protection reaches its nadir.[2] This dichotomy is aptly illus-

[2] We are not suggesting that the fate of a business entity's First Amendment rights turns upon its economic self interest (see *First National Bank of Boston* v *Bellotti,* 435 US 765). To the contrary, petitioners' economic interest would be well served by promotional advertising. Rather, it is the beneficial or detrimental impact of commercial information upon society which assumes importance on analysis.

trated by *Ohralik* v *Ohio State Bar Assn.* (436 US 447, *supra*), where a prohibition of in-person solicitation by attorneys was upheld. *Ohralik* recognizes the "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." For this reason, commercial speech occupies a "subordinate position in the scale of First Amendment values" (Id., at p 455-456). Thus, a particular mode of advertising which would not well serve the societal interest in informed decisionmaking, such as in-person solicitation, may constitutionally be banned: "In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services * * * it actually may disserve the individual and societal interest * * * in facilitating 'informed and reliable decisionmaking'" (Id., at pp 457-458). Such speech, *Ohralik* teaches, may be prohibited in the public interest.

Applying these principles, the ban on promotional advertising of electricity is consistent with First Amendment strictures. Public utilities, from the earliest days in this State, have been regulated and franchised to serve the commonweal. Our policy is "to withdraw the unrestricted right of competition between corporations occupying * * * the public streets * * * and supplying the public with their products or utilities which are well nigh necessities" (*People ex rel. New York Edison Co.* v *Willcox,* 207 NY 86, 99; *Matter of New York Electric Lines Co.,* 201 NY 321). The realities of the situation all but dictate that a utility be granted monopoly status (see *People ex rel. New York Electric Lines Co.* v *Squire,* 107 NY 593, 603-605). To protect against abuse of this superior economic position, extensive governmental regulation has been deemed a nec-

essary coordinate (see *People ex rel. New York Edison Co.* v *Willcox, supra,* at pp 93-94).

In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in "informed and reliable" economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping. At best consumers may seek, through the Public Service Commission, to limit future increases in electrical prices. Surely promotional advertising would provide no information of assistance in this respect.

Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and prices" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Accordingly, the order of the Appellate Division in each case should be affirmed, with costs.

* * * * *

In each case:

Order affirmed, with costs. Opinion by Cooke, Ch.J. Concur: Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

Decided May 1, 1979

Appendix B

Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, July 27, 1978

SUPREME COURT
STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

33186

In the Matter of

CONSOLIDATED EDISON CO. OF NEW YORK,
Respondent,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant.

CONSOLIDATED EDISON CO. OF NEW YORK,
Respondent,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant.

33185

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORP.,
Respondent-Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant-Respondent.

Appendix B

Argued, June 20, 1978. Decided, July 27, 1978.

Before:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

APPEAL, in the first above-entitled proceeding, from a judgment of the Supreme Court at Special Term (ROGER J. MINER, J.), entered March 6, 1978 in Albany County, which (1) granted petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate an order of the Public Service Commission (PSC) and (2) declared that the order was unconstitutional.

CROSS APPEALS, in the second above-entitled proceeding, from a judgment of the Supreme Court at Special Term (ROGER J. MINER, J.), entered March 14, 1978 in Albany County, which granted in part and dismissed in part petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate an order of the Public Service Commission (PSC).

* * * * *

GREENBLOTT, J.

We are here concerned with two separate appeals but because of the similarity of issues we are considering them together.

The first appeal concerns an order of the Public Service Commission (PSC) issued on February 25, 1977 which provided, in pertinent part, that "[a]ll utilities subject to the jurisdiction of this Commission shall discontinue the

practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy". Petitioner, Consolidated Edison Company of New York, Inc. (Con Edison), challenged the validity of that portion of the order and Special Term annulled the order to the extent that it prohibited Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy. Special Term concluded that there was no basis in the statutory powers accorded the PSC which would authorize the total ban of such inserts. We disagree.

The PSC has general powers of supervision and regulation over activities of gas and electric utilities. (See, e.g., Public Service Law, § 66.) The issue before us is whether, given these powers, the PSC may prevent management from expressing its political positions in a manner that is inevitably subsidized by the consumer, particularly when the PSC places no restrictions on advertisement by any other means. We hold that it may.

Con Edison does not dispute that the PSC has a duty to allocate costs for political advertising to accounts chargeable to shareholders (16 NYCRR ch 3, subch F, account 426.4). An obvious corollary of this duty is the requirement that consumers not be charged with the costs of these political activities. The PSC necessarily has the duty to protect consumers from such charges.

The PSC protests that, given the manner of airing its views chosen by Con Edison, it cannot fulfill that duty. We agree that it would be impossible to separate out the costs attributable to mailing the bills (a customer expense) from the costs attributable to mailing out management statements (a shareholder expense). Unless the PSC allocates all the costs of mailing as well as costs of stuffing

the envelopes to the utility, management will benefit from a savings in postage and labor, a subsidy the PSC is empowered to prevent. That the mailings would not cost the consumers anything is irrelevant since the issue is whether management's costs will be reduced through customer subsidy. In the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses.

We also reject the argument that the order is a violation of the utilities' free speech rights. Since the PSC's authority to issue the order and the necessity for doing so have been established, it is only a serious infringement of petitioner's constitutional rights that would warrant our annulment of the order. Here, there is no order barring Con Edison from expressing its opinions, nor is there an order barring the company from using the usual forms of advertisement. There is merely an order prohibiting the use of bill inserts to put forth management positions. This insignificant impingement on petitioner's rights is far outweighed by the PSC's duty to prevent customer subsidy of management's pamphleteering.

Nor do we view the order as being fatally vague. The order restricts only the utility's use of the bill insert to express its "position on controversial matters of public policy". The boundaries of the order need not be defined with utmost exactitude. We have little doubt that the PSC and the utilities are capable of distinguishing useful information for consumers (e.g., ways to conserve energy) from management's statement on the political issues of the day (e.g., benefits of nuclear energy). Further the order clearly contemplates expenditures that would qualify under account 426.4 of the PSC's accounting guidelines (16 NYCRR ch 3, subch F) as expenditures to influence public opinion. This is as detailed a statement of the contours of the order as the Constitution requires. Thus, the judgment entered March 6, 1978 must be reversed.

Appendix B

In the second appeal petitioner Central Hudson Gas & Electric Corp. (Central Hudson) cross-appeals from a judgment of Special Term insofar as the court dismissed its application to vacate that part of the order of the PSC issued on February 25, 1977 which classified expenses for advertising designed to sway public opinion as nonoperational and, therefore, chargeable to shareholders and which prohibited promotional advertising by electric utilities. For the reasons hereinbefore mentioned so much of the judgment as annulled that portion of the PSC order banning the use of bill inserts as a means of disseminating the utility's position on controversial matters of public policy should be reversed.

Concerning the prohibition of promotional advertising Central Hudson initially argues that no statutory authority empowers the PSC to order such a prohibition. The PSC relies on its statutory obligation to assure that rates charged are just and reasonable (Public Service Law, § 66) and upon subdivision 2 of section 5 of the Public Service Law which requires the PSC to encourage corporations subject to its jurisdiction "to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of the environmental values and the conservation of natural resources." In justification, the PSC concluded that promotional advertising will increase the use of electricity causing spiraling price increases due to the fact that present rates do not cover the marginal cost of new capacity; that such advertising provides misleading signals that energy conservation is unnecessary; and that additional usage will increase the level of dependence on foreign sources of fuel oil. Considering the impact of promotional advertisement, the PSC is, in our view, statutorily empowered to prohibit such advertisement (Public Service Law, §§ 66, 5, subd 2).

Appendix B

Central Hudson also argues that the prohibition violates its right to free speech as guaranted by the First Amendment to the United States Constitution. The Supreme Court has held that commercial speech falls within the protection of the First Amendment (*Virginia Pharmacy Bd.* v *Virginia Consumer Council,* 425 US 748). More recently, in a case where a prohibition was directed at speech itself, the Supreme Court held that the prohibition must be supported by a showing of a subordinating interest which is compelling and the burden is on the government to show such an interest (*First Nat. Bank of Boston* v *Bellotti,* —— US ——, 98 S Ct 1407). Upon our review of the record, it is the opinion of this court that the PSC has sufficiently demonstrated such an interest and, therefore, the prohibition of promotional advertising is not violative of Central Hudson's First Amendment right to freedom of speech.

Expenditures for political and related advertising activities have normally been excluded from operational expenses in the rate-making process and consequently have been chargeable to shareholders rather than ratepayers (16 NYCRR, ch 3, subch F, account 426.4). Central Hudson, however, argues against the expansion by the PSC of the definition of political and related advertising activities to include "all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes". Specifically included in this category by the PSC were expenses incurred in advertisements designed to influence public opinion concerning the development of nuclear energy. We agree with Special Term that the PSC may properly classify such expenditures pursuant to its

rate regulating activities and that the expanded definition propounded by the PSC is not overly broad, arbitrary or capricious (see *Southwestern Elec. Power Co.* v *Federal Power Comm.*, 304 F2d 29, cert den *sub nom. Alabama Power Co.* v *Federal Power Comm.*, 371 US 924). We also find no constitutional infirmity in such categorization.

The judgment entered March 6, 1978 should be reversed, on the law, without costs, and the order declared constitutional.

The judgment entered March 14, 1978 should be modified, on the law, by deleting so much thereof as annulled the PSC's directive; determination confirmed, and, as so modfied, affirmed, without costs.

SWEENEY, J. (concurring in part and dissenting in part). We respectfully dissent from that part of the majority's decision that holds that the Public Service Commission (PSC) is authorized to restrict political inserts in billing envelopes.

The PSC has only those powers conferred upon it by the Legislature and such additional powers as are incidental thereto or necessarily implied therefrom (*Matter of New York Tel. Co.* v *Public Serv. Comm. of State of N. Y.*, 59 AD2d 17). Two provisions of the Public Service Law are proposed by the PSC as authority in support of the ban in question. Initially, it is urged that subdivision 3 of section 65 of the Public Service Law is violated by the use of bill inserts in that it gives the managements of the utilities a benefit or advantage unavailable to others. It is clear, however, that subdivision 3 of section 65 relates to the prohibition of discrimination in the provision of services and no such discrimination is present in the instant case.

It is also argued by the PSC that subdivision 2 of section 66 of the Public Service Law authorizes the ban on bill inserts as that section empowers the PSC to "order such reasonable improvements as will best promote the public interest". In support of this argument, it is contended that the order in question is designed to protect utility subscribers generally from the conversion of the billing process into a subsidized forum for the dissemination of management's political views. The majority adopts the position of the PSC that the bill inserts would be inevitably subsidized by the consumer and consequently finds authority in the PSC to prohibit the use of bill inserts. In our view, however, it would not be impossible for the PSC to perform its duty of allocating the cost of these management statements to accounts chargeable to shareholders. We find nothing to prohibit the PSC from proportioning the costs so that the cost attributable to the placing of the bill inserts in envelopes and the mailing of the bill inserts would be chargeable to shareholders rather than ratepayers. Such an apportionment would prevent the subsidizing of management's views through the use of bill inserts. Consequently, we find no express or implied statutory power authorizing the PSC to ban the bill inserts prohibited by its order of February 25, 1977. We would, therefore, affirm both of the judgments here on appeal.

MAHONEY, P.J., and MIKOLL, J., concur with GREENBLOTT, J.; SWEENEY and MAIN, JJ., concur in part and dissent in part in a separate opinion by SWEENEY, J.

Judgment entered March 6, 1978 reversed, on the law, without costs, and order declared constitutional.

Judgment entered March 14, 1978 modified, on the law, by deleting so much thereof as annulled the Public Service Commission's directive; determination confirmed, and, as so modified, affirmed, without costs.

Appendix C

Opinion of the New York Supreme Court, Albany County, February 17, 1978

STATE OF NEW YORK

SUPREME COURT: COUNTY OF ALBANY

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Defendant.

Supreme Court, Special Term,

Albany County, February 17, 1978

* * * * *

ROGER J. MINER, J.

Plaintiff-petitioner (Con Edison) challenges the validity of the following portion of an order issued by defendant-respondent (PSC) on February 25, 1977: "All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills

rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy." The challenge is predicated upon claims of First Amendment violation and unconstitutional vagueness.

The inquiry by PSC into the proper scope of leaflets enclosed with utility bills apparently was spawned by complaints addressed to a Con Edison bill insert relating to the need for nuclear power development. The complainants sought a PSC ruling that would permit them to enclose an insert in a future billing presenting their views on nuclear power. They also sought a ruling "that where the billing process has been used for purposes of advocating one side of a political and controversial issue of public importance, the forum of the billing packet must then be opened to contrasting points of view".

After receipt of the complaint, the PSC, in a separate administrative proceeding, began an over-all review of its policy concerning advertising by regulated utilities. The review culminated in a statement of advertising policy issued on February 25, 1977 and an "Order Implementing Certain Restrictions on Utility Advertising" issued the same date. The order included the bill-insert restriction quoted above. A request for a rehearing by Con Edison and others was denied by PSC order dated July 14, 1977. This order included a determination that a program allowing the expression of all points of view in bill inserts would be too difficult to administer.

In its policy statement and orders the PSC found that it would be unfair to subject ratepayers with differing points of view to the arguments of utilities through the billing mechanism; that the billing mechanism provides a unique means for utilities to present their views to rate-

payers and that the use of the mechanism for that purpose would confer an undue advantage; and that due to spacial limitations, bill inserts should convey only information clearly helpful to consumers.

A long-standing regulation of the PSC provides that expenditures for the purpose of influencing opinion or advancing the political objectives of an electric utility should be chargeable to shareholders in an income deductions account. (16 NYCRR ch II, subch F, art 1, Accounts, Income Accounts, Account No. 426.4.) It is proper to charge such expenditures to shareholders rather than ratepayers and an administrative determination as to the classification of the expenditures is within the discretion of the PSC. (*Southwestern Elec. Power Co.* v *Federal Power Comm.*, 304 F2d 29, cert den 371 US 924.) However, the order under attack purports to prohibit totally the dissemination of public policy positions by means of bill inserts. The court finds that this prohibition is improper and beyond the authority of the PSC.

It is well settled that commercial speech is protected by the First and Fourteenth Amendments to the United States Constitution. (*Bigelow* v *Virginia,* 421 US 809.) The time, place or manner, but not the content, of such speech may be regulated to effectuate a significant governmental interest. (*Virginia Pharmacy Bd.* v *Virginia Consumer Council,* 425 US 748; *Suffolk Outdoor Adv. Co.* v *Hulse,* 43 NY2d 483.) There can be no question that the ban upon the use of bill inserts constitutes a restriction upon commercial speech.

The PSC contends that compelling interests justify the order, but the arguments advanced in support of this contention are not persuasive. The use of bill inserts does not represent a subsidized means of presenting management's

views, since it is conceded that the cost of mailing would be the same whether or not the inserts were included with the bills. Moreover, the PSC may allocate any increased cost to the proper account. Consumers are not, therefore, required to subsidize views with which they do not agree. (Cf. *Abood* v *Detroit Bd. of Educ.,* 431 US 209.) The argument that subscribers constitute a captive audience to be protected from receiving certain mailed matter must be rejected, since the mailbox is not a constitutionally protected enclave. (*Lamont* v *Commissioner of Motor Vehicles,* 269 F Supp 880; cf. *Rowan* v *United States Post Off. Dept.,* 397 US 728.)

Although the PSC asserts that alternate channels of communications are open to management, such channels involve more cost, are less likely to reach subscribers and may be less effective. (*Linmark Assoc.* v *Willingboro,* 431 US 85.) The claim that bill inserts afford an undue preference or advantage to management within the meaning of subdivision 3 of section 65 of the Public Service Law is rejected, the cited section being inapplicable here.

The ban on the discussion of "controversial matters of public policy" through the medium of billing inserts presents a vague standard. (*Coates* v *City of Cincinnati,* 402 US 611; *Grayned* v *City of Rockford,* 408 US 104.) Controversy is defined as an occasion of disagreement or contention. (Webster's New International Dictionary [3d ed], p 497.) Public policy is the governing policy within a community and is a variable quantity. (Webster's New International Dictionary [3d ed], p 1836; Black's Law Dictionary [4th ed], pp 1317-1318.) It is apparent that great difficulty may arise in attempting to categorize a particular matter as a controversial question of public policy. The fact that the PSC has offered to provide ad-

Appendix C

visory opinions as to whether specific issues are included in the ban illustrates the difficulty of defining the matters prohibited.

The PSC argues that the standard is virtually identical to that approved in *Red Lion Broadcasting Co.* v *Federal Communications Comm.* (395 US 367). In *Red Lion* radio broadcasting regulations implementing the fairness doctrine were under scrutiny. The regulations required radio stations to give reply time to answer any personal attack or political editorial involving a "controversial issue of public importance." Taking into account past adjudications by the FCC providing added precision to the regulations, the Supreme Court determined that the regulations as a whole, including the quoted phrase in context, were not so vague as to permit the FCC "to vindicate its own idiosyncratic conception of the public interest". (*Red Lion, supra*, p 395.) In the absence of prior definitions by the PSC and considering the context of the "controversial matters" phrase in the PSC order together with the unique status of the broadcasting industry, the holding in *Red Lion* cannot be applied to the issue of vagueness in the case at bar.

The PSC maintains that the privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly and therefore may be regulated to assure its exercise in the public interest. Although this may be true as a general proposition, the regulation adopted here totally banning such inserts has no basis in the statutory powers accorded to the PSC. (*Matter of City of New York* v *Public Serv. Comm.*, 84 Misc 2d 1058, affd 53 AD2d 164; 48 NY Jur, Public Utilities § 9.)

Submit judgment for petitioner-plaintiff.

Appendix D

Final Judgment of the Court of Appeals of the State of New York, May 1, 1978

REMITTITUR

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

3 No. 150

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

The appellant in the above entitled appeal appeared by Joseph D. Block and Peter Garam; the respondent appeared by Peter H. Schiff.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Cooke,

Appendix D

Ch.J. Concur: Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa, *Clerk of the Court*

Court of Appeals, Clerk's Office, Albany, May 1, 1979.

Appendix E

Opinion of Public Service Commission of the State of New York, February 25, 1977

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Statement of Policy
on Advertising and Promotional
Practices of Public Utilities

Issued: February 25, 1977

Appendix E

TABLE OF CONTENTS

	PAGE
Promotional Advertising	35a
(1) Electricity	35a
(2) Gas	38a
(3) Telephone Companies	40a
Institutional Advertising	41a
Civic, Political and Related Advertising Activities	41a
Informational and Other Institutional Advertising	44a
Statement of Chairman Kahn concurring in part and dissenting in part	47a
Statement of Commissioner Mead dissenting in part	56a

Appendix E

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

COMMISSIONERS:

Alfred E. Kahn, Chairman, concurring in part and dissenting in part
Edward Berlin, Deputy Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead, dissenting in part
Charles A. Zielinski

STATEMENT OF POLICY
ON ADVERTISING AND PROMOTIONAL
PRACTICES OF PUBLIC UTILITIES

(Issued February 25, 1977)

BY THE COMMISSION:

On July 28, 1976, we issued a notice of proposed policy statement and requested comments on the subjects of advertising by utilities and the promotion of electricity sales. We indicated our intention to reexamine subjects covered in our 1972 policy statement on these matters[1] in light of contemporary conditions. We asked interested parties to comment on the items discussed in the proposed policy statement and to offer alternative suggestions on these issues if they so desired.

Over 300 responses to our notice were received. Many of these were brief statements of position from individual consumers; others, including those from most of the util-

[1] *Statement of Policy on Advertising and Promotional Practices by Public Utilities*, 12 NY PSC 108-R (issued June 21, 1972).

ities, consumer, environmental and other special interest groups, were more comprehensive in scope. Because of the great number of responses, no attempt will be made in our discussion to identify the particular views of individual respondents. It is worthy of special mention, however, that we found the responses extremely valuable. They were all carefully considered and evaluated in reaching decisions on the issues presented in our notice.

Although the amount of money spent on advertising by major utilities in this State is a very small portion of their total revenues, the proper extent and content of such advertising and the ultimate responsibility for its cost is an increasingly controversial issue. This Commission has routinely monitored the advertising practices of New York utilities within the framework of the Uniform System of Accounts and the guidelines for rate treatment of these expenditures set forth in our 1972 policy statement, as subsequently amended in individual rate proceedings. Thus, we have established a system of regulation which has provided reasonable assurance that even the minor amounts expended are properly accounted for, so that we can determine whether utility rates reflect only reasonable amounts, expended for proper purposes.

Our 1972 policy statement was issued at a time when the telephone industry was beset with significant service problems, since largely overcome, when the emerging gas supply shortage was first recognized and, of perhaps greatest importance, before the 1973 oil embargo which resulted in severe fuel oil shortages and sharply increased oil costs. While we have, through individual rate and other orders, amended the provisions of the 1972 policy statement where necessary to meet these changing conditions, we have during the past year felt it desirable to have a fresh look, in integrated fashion, at the totality of issues associated with utility company advertising and promotional practices, in the light of circumstances of 1976 and 1977.

Advertising expenses may be subdivided into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales.

Promotional Advertising[1]

(1) *Electricity*

The 1972 policy statement contained no restriction on the promotional advertising of electric utilities, explicitly recognizing that those companies had exercised self-restraint in these efforts, most of which were limited to development of off-peak loads. Shortly after the oil embargo, and in response to the reductions in oil supplies, we prohibited the promotion of the use of electricity through advertising or the provision of subsidy and incentive plans. That ban is still in force.

In our July 28, 1976 notice, we requested comments on a proposal to lift the flat ban against sales promotion by electric companies. We listed several competing considerations, some arguing for extension of the ban and others for its relaxation.

Of the responses received on this specific matter, a large number of parties suggested that electric companies be permitted to develop off-peak loads. In addition to the

[1] In addition to establishing the policy set forth below, we will require strict adherence to the accounting classifications of this type of advertising as set forth in the Uniform System of Accounts prescribed for electric, gas and telephone utilities. See Resolution of the Commission: Amendment of 16 NYCRR, Chapters II, III and VI, Article 1, adopted October 24, 1973.

benefits of a limited relaxation that were mentioned in our notice, many of these parties pointed out that development of off-peak load would likely result in a lowering of the unit cost of electricity, due to a greater utilization of existing plant, with a resulting downward pressure on, or at least a stabilization of, present rates. Others observed, as we did in our notice, that where electricity competes with oil, promotion of electricity, if generated incrementally from coal or uranium, could confer the additional benefit of making this country more independent of foreign oil supplies in those cases where oil is the primary competitive fuel.

We recognize now, as the Commission did in 1972, that development of off-peak loads may be beneficial in numerous ways. Increased off-peak generation, however, while conferring some beneficial side effects, also consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts. We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed. Nevertheless, conservation of energy resources remains our highest priority. We do not consider

it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

We conclude that the existing ban on promotion of electricity sales should be continued. We recognize, however, that as we move toward more and more widespread adoption of time-of-day rates, it may be highly desirable for companies to publicize those rates, and point out the various ways in which customers may take advantage of them. While this advertising may better be described as informational, we wish to make clear, in any case, that it is our desire to permit advertising of this kind, provided it has the exclusive, or at least preponderant effect of encouraging *shifts* of consumption from peak to off-peak and little or no effect of increasing aggregate sales. For these reasons, we will remain prepared to approve specific proposals by the companies for specifically described programs that meet these criteria. We shall reexamine from time to time our determination to continue, with the limited exception for publicizing time-of-day rates, the ban on promotional advertising should conditions change sufficiently to warrant such a reevaluation. Further, we shall continue to maintain surveillance of all advertising activities engaged in by electric utilities, and where deviations from the requirements of our order are found, we will take remedial action, including adjustments in rates cases, to bring about compliance.

Appendix E

(2) *Gas*

Because of the then emerging and increasingly severe shortage of natural gas, on October 26, 1971,[1] we ordered all gas companies (with the exception of several small companies specially situated) to limit the attachment of new gas customers and the expansion of gas service to existing customers.[1] That order also provided:

> Effective January 1, 1972, all gas distributors subject to the restrictions imposed herein shall cease all promotional activities designed to acquire new gas customers or increase sales of gas to existing customers. Except to the extent indicated below, such prohibition shall apply to all advertising employing mass media, all bill inserts or other direct mailings to customers or others, and all calls by salesmen seeking to obtain or arrange "conversions" to gas space heating or to sell or promote the sale of gas appliances. The prohibition does not apply to:
>
> (a) Service calls to repair existing gas equipment, recommendations relating to the replacement of such equipment, and information relating to such replacement.
>
> (b) Advice directed to existing customers as to how they may achieve the best heating and safety results with respect to existing gas equipment. Use of the mass media or unselective mailings are not an acceptable means of accomplishing this objective.
>
> (c) Direct contact with existing or potential customers for the purposes of encouraging the installation of dual-fuel equipment.

[1] Case 25766, the *Gas Restriction Case*, 11 NY PSC 1257.

Appendix E

> (d) Individual responses to inquiries received by a gas company without prior solicitation.

These provisions were incorporated into our 1972 Policy Statement and remain in effect. We have reexamined these requirements in light of current conditions and conclude that, for the most part, they should remain unchanged. We are, however, concerned about the exception granted in item (c) above. Because additional demand for gas can be created as a result of direct contact with potential customers for the purpose of encouraging the installation of dual-fuel equipment we will no longer consider this a permissible activity by gas utilities. Of course, the companies may continue to encourage their existing gas customers to install alternate fuel equipment. In addition, in view of the deepening gas supply shortage, and the essentiality of inducing all customers to conserve, we will no longer permit promotional activities designed to retain existing customers at previous levels of consumption, except in those limited instances where gas companies are permitted to attach new residential load to offset a decline in firm load.

All other provisions of our previous order will remain in effect, as to each gas company covered. Exceptions to this policy may be granted provided a company can clearly demonstrate that it has firm supplies of gas, for the present and near future, sufficient to permit it to engage in some limited form of promotional activity without lessening the supply of gas available to existing customers.

As long as the shortage of natural gas continues, we shall maintain close surveillance of advertising and other promotional activities of gas companies. We shall also continue to require prior submittal of the promotional

plans of gas utilities seeking to deviate in any way from our order in Case 25766 as amended here.

(3) *Telephone Companies*

On February 11, 1970, we directed New York Telephone Company to "cease all promotional advertising and all other promotional activities designed to attract additional subscribers or otherwise to increase telephone usage until such time as the company's capacity to provide service exceeds busy-hour requirements throughout the state, except for local promotions in areas where ample capacity exists." Case 25290, *New York Telephone Company Service Case,* First Interim Order, 10 NY PSC 93. Since adoption of this order, New York Telephone Company's capacity to provide service has improved to the point where it now exceeds busy-hour requirements throughout the state. By order issued in Case 25290 on March 13, 1973, 13 NY PSC 461, we relaxed the promotional advertising restrictions previously imposed "provided that the company will insure that the service sought to be promoted will not burden the subscriber body with an increase in average costs, but rather will tend to reduce the burden of cost which must be supported by the average subscriber."

While the interim order in Case 25290 was outstanding, we considered whether the promotion of yellow pages should also be restricted and we concluded that it should not. Yellow pages promotion may increase telephone usage to some extent, but the major purpose of these directories is to facilitate more efficient use of the telephone by reducing calls to information or to parties unable to assist the caller.

We shall continue the policy on telephone promotional advertising that is now in effect. Promotional advertising by New York Telephone Company, or by other telephone companies, including radio-telephone utilities, will be carefully scrutinized to assure (1) that adequate capacity exists to provide the service sought to be promoted without adversely affecting existing subscribers; and (2) that the advertising expenditures themselves together with the expansion of the service which they seek to promote will tend to reduce rates for telephone service.

Institutional Advertising

In addition to seeking to promote sales, utilities (like other businesses) engage in "institutional advertising"—a rather amorphous phrase covering all advertising which is not sales promotional in nature. Although our staff has employed some relatively useful tests in reviewing expenditures for this kind of advertising,[1] the very imprecision of the definition has caused substantial controversy in our proceedings about whether certain kinds should be recovered in rates. Therefore, we believe there is a clear need to reexamine this area, and to establish a policy for treatment of related expenses in rate cases. We consider separately two categories of institutional advertising: (1) civic, political and related advertising activities, and (2) informational and other institutional advertising.

Civic, Political and Related Advertising Activities

It is generally accepted that advertising which states a utility's position on a matter of public controversy necessarily reflects the political views or self-interest of man-

[1] *E.g.*, "Is the advertising clearly beneficial to consumers?"

agements or shareholders and should not be borne by ratepayers, whose views or interests may differ. Thus, political advertising—in support of, or opposed to, governmental action of any kind—will not be considered a legitimate cost of doing business for the purpose of determining rates. See *Complaint of Grassroots Action, Incorporated*, Case 26315, April 18, 1973, 13 NY PSC 630. Our amended Uniform System of Accounts reflects this view. All political advertising is required to be recorded below the line in nonoperating expense account No. 426.4. Expenditures recorded in this account are routinely excluded in the ratemaking process.

Our decisions in two recent cases notwithstanding,[1] we shall also include in the category of political and related activities, and therefore payable by stockholders, all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes. Utilities, of course, have the right to publish their thoughts on vital issues concerning their operations, but, upon consideration of the comments received in response to our notice, we are now persuaded that it is unfair to impose the cost of disseminating those thoughts onto ratepayers who may or may not agree with them. The expression of a utility's views on a controversial issue may truly reflect its concern for the welfare of its consumers and may make a genuine contribution to a public policy debate; but we believe that it is basically unfair to assess against ratepayers the cost of advertisements urging the adoption of positions with which they may disagree. Therefore, we will no longer

[1] Case 26848, *Rochester Gas & Electric Corporation* (Opinion 76-8, issued April 8, 1976) and Case 26887, *Long Island Lighting Company* (Opinion 76-11, issued May 28, 1976).

sanction the use of sums provided by ratepayers to advance one side of a public controversy. We include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power. We do not seek by this action to inhibit or discourage participation by utilities in public debates of issues that vitally concern them: we recognize and endorse their right to do so. We simply believe that it is wrong to expect ratepayers to finance that participation.

Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.

Informational and Other Institutional Advertising

Some forms of utility institutional advertising clearly are in the public interest and their costs are a legitimate expense of doing business. These include appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like. Expenses incurred by utilities for this type of advertising are clearly properly recoverable in rates.[1]

There is, in addition to purely informational, a large middle ground of institutional advertising that falls somewhere between that clearly beneficial to customers, and that which is clearly political or controversial. There is advertising, for example, in which a company defends, justifies, or even merely explains and describes its activities. It might be argued, on the one hand, that there is no reason for ratepayers to bear the costs of such self-justification; that it is not of direct usefulness to them. On the

[1] In addition to purely informational advertising, those advertising costs attributable to a utility's effort to upgrade the residential and industrial potential of its franchised territory and to improve the area's overall economic condition are properly recoverable. Advertisements extolling the desirability of the area as a location for job-creating industry would, if successful, benefit all of the utility's customers. Whatever its possible effects on utility rates, its benefits for the economy of New York State clearly makes such advertising a fully acceptable activity by utility companies.

other hand, it is extremely difficult to argue, especially now when public utilities are subjected to frequent public attack and criticism, that these are not, within limits, legitimate and indeed inescapable costs of doing business in today's conditions. It is unreasonable not to afford utility managements under attack an opportunity to explain and justify themselves. It might be argued, of course, that since such expenditures are on behalf of the companies rather than in the direct service of their ratepayers, they ought to be paid for by the shareholders. But if they *are* inescapable costs of doing business, and if, as is our policy, we allow shareholders returns only at the minimum level necessary to attract capital, then at least in principle if we were nominally to disallow these expenditures from rates, we would have to provide a correspondingly larger return on equity.

Our experience demonstrates that the time spent by our staff in ferreting through innumerable vouchers of institutional advertising is far out of proportion to the dollar amount of expenses found in that process to be unacceptable for rate purposes. For example, in the year 1975, *all* advertising costs spent by the seven largest privately owned electric, gas and steam utilities in New York State amounted to $3,370,000. Since the utilities received $5,280,264,000 in revenues for that year, the advertising costs equated to 6/100 of 1% of those revenues: six cents on *all* forms of advertising for every $100 in revenues received. It follows that since institutional advertising of a questionable nature is only a part—and typically a very small part—of total advertising, its impact on rates would be very slight indeed. It is obvious that any benefits gained from close, individual examination of these insignificant costs must be outweighed by the costs of their examination.

It is for these reasons that we have decided to allow companies a very small pool of dollars in rates to cover both informational and the intermediate category of "other institutional" advertising. On the basis of past practice, this allowance will, in all probability, range between 1/10 and 1/25 of one percent of operating revenues, in inverse relationship to the size of the companies. It will be determined individually for each company, in its next or pending rate case,[1] on the basis of various other factors including size, geographical location, number of customers and costs of doing business in the area. Adoption of this modest lump sum advertising allowance approach will end the vexing and essentially arbitrary process our staff now engages in of reviewing all informational and other institutional advertising to decide whether specific expenses should be allowed or disallowed in setting utility rates.

This plan will obviously not solve all the problems we have described: we will still have to determine which advertisements are clearly political and/or self-serving, and specifically disallowed: and parties in rates cases would still be free to question the propriety of the lump sum allowance for the informational and other institutional advertising categories. On the other hand, it has the virtue of recognizing that some modest institutional expenditures, over and above those purely informational in nature, are an inescapable and legitimate cost of doing business, and get the Public Service Commission out of the business of an item-by-item content examination and evaluation of past advertisements—an activity in a sense redundant anyhow, in view of the fact that all we really do is set a reasonable level of rates for the future.

[1] In pending cases where the hearings have been completed, parties may present their views on a proper lump sum institutional advertising allowance on brief.

Our staff will maintain close and continuing scrutiny over the level of the lump sum advertising allowance for each company to assure that the amount provided is sufficient to cover only reasonable and necessary advertising costs consistent with this policy statement. We expect to review the policies set forth here periodically and to revise them when it seems desirable to reflect new or changed circumstances.

In the area of developing better public relations and avoiding obvious areas of customer dissatisfaction, utility managements are urged to give serious consideration to the clear labeling of the institutional advertising that will not be recorded as a cost of doing business for rate purposes. It is not in the interest of anyone to have institutional advertising exacerbate customer resentments at a time when large rates increases are made necessary by increases in various classes of costs beyond the control of utility management. Expenditures for institutional advertising *are* subject to management control and utility managements would be well advised, if the advertisement is either political or of a type not providing useful information to customers, to state in the advertisement itself: "The costs of this message are being borne by the company's stockholders and the expense will be excluded from consideration in any proceeding concerned with fixing the company's rates."

ALFRED E. KAHN, Chairman, concurring in part and dissenting in part:

I am for the most part in agreement with the conclusions we reach in this decision and the supporting argument, having participated actively in their formulation. At the same time, my views about our proper role in regulating

the advertising policies of utility companies are sufficiently distinctive from those of my fellow commissioners to make me want to set them forth in my own words and over my own signature.

I begin by saying, in different words, what our opinion says: namely, that the many hours that we, our staff, the regulated companies and various intervenors devote to utility company advertising policies, and to deciding what portion of such expenditures are properly recovered in rates, are by any reasonable test a waste of time and ratepayers' money. These efforts must surely have the lowest benefit/cost ratio of any in which we engage; and the time inescapably devoted to them by our staff and commissioners would almost certainly have a much larger pay-back to ratepayers if it could be devoted to other endeavors—such as the further scrutiny of management efficiency, the formulation of more efficient rate structures, more intensive pressures on the companies we regulate to engage in load management and to encourage conservation. The heated discussions about advertising policy are, in other words, a tempest in a teapot, considering, first, the very, very small number of dollars at stake, and, second, the essential fraudulence of our purporting to exclude from rates expenditures for advertising that company managements will continue to feel it necessary to make: since we make every effort to set the allowable return on equity at the minimum cost of capital, and most of the companies we regulate are not earning even that, in principle putting any advertising expenditures "below the line" can only mean, if we are honest, increasing the allowed return on equity, in order to enable these companies to raise the capital they need on reasonable terms.

For these reasons, I am particularly enthusiastic about our decision to provide companies with a very, very modest lump-sum allowance for institutional advertising. It is a first step in the direction of sanity, offering the hope of cutting down on the endless hours our staff has to devote to scrutinizing individual advertisements, then deciding and litigating whether they are properly includable in test-year expenses for rate-making purposes.

At the same time, there are many things we do and must do that cannot be said to pay off on a pure dollar and cents basis. If it infuriates some consumers to see some of their dollars—even if for each of them it means only a penny a year—spent to extol the benefits of nuclear power, or to induce them to purchase additional electricity or gas, or to make greater use of the communications facilities provided them by franchised monopolists, we must confront the question of principle, of whether we should be condoning this kind of use of ratepayers' dollars, even if the confrontation costs ratepayers more dollars than the companies spend in these questionable ways.

If it comes to questions of principle, however, there are more principles at stake than the Commission seems willing to recognize in its decision today, and it is these that I take the occasion of this partial concurrence and partial dissent to spell out.

Promotional advertising by electric companies

It is only with the greatest reluctance and distaste that I join my colleagues in continuing our absolute prohibition of promotional expenditures by electric companies. While, as a non-lawyer, it has never been clear to me why the protections of the Fourteenth Amendment, which as a

matter of historical fact was enacted to protect the rights of real, biological *people,* should necessarily have been extended to state-created artificial entities like corporations, I also believe in competition as a form of economic organization, wherever it is feasible. And for competition to be effective, some sales promotion is necessary. Even if that were not so as a general matter, it would in my judgment be inescapably so when there compete in the market two rivals, one of whom is free to advertise his wares and the other is—under our present policies—not.

The issue of whether electric companies should be permitted to advertise (observe that the question before us is not whether those expenditures should be recovered in rates, but one, rather, of our totally prohibiting such activities) arises almost exclusively in the context of summer-peaking electric companies wanting to be permitted to promote electric space heating, which is for them essentially an off-peak use of power, with their principal rivals, the distributors of *heating oil,* vociferously importuning the Public Service Commission and the Legislature to prevent them from doing so. An idea is not necessarily a bad one merely because it is propounded by a scoundrel, or—as in this case—a businessman who wants to be relieved of the burdens of competition. But it has always been a source of wonder to me how self-styled protectors of the consumer interest could have so readily allied themselves —to such a point that in some cases the distinction between them disappears entirely—with people who seek the assistance of government in suppressing competition.

There are considerations in this case, however, that induce me to go along with continued prohibition, however queasily.

1. The first is grounded in a combination of facts: first, that for apparently all of the summer-peaking electric companies in the state, marginal generating capacity off-peak as well as on is oil-fired, and promises to continue to be for several years; and that the use of such capacity to provide electricity for resistance heating, because of the fact that it takes something like three btu's of oil to generate the equivalent of one btu of electric energy, is simply far less efficient in energy terms and uses more oil in total than direct combustion of the oil for space heating purposes. (I must point out, however, that the three for one comparison grossly exaggerates the relative inefficiency of electric resistance heating, because it fails to take into account the energy costs of delivery of oil to the various points of consumption; the far less than 100% efficiency with which oil is typically burned in furnaces; the lesser injury to the environment from combustion of oil in electricity generation than, alternatively, in thousands of separate furnaces; and the promise of the heat pump of sharply increasing the efficiency of the use of electricity for heating. But electric space heating still seems to use more oil, typically; and it is a matter of utmost urgency to reduce the dependence of our economy on imported oil, which must supply the growing difference between what we are capable of producing at home and what we consume.)

On the other hand, I find myself in basic disagreement with the popular simplistic view that electric resistance space heating should simply be banned because it is "less energy efficient." I do not accept an exclusively energy standard of value. There are many pertinent costs and benefits besides the direct use of energy to be taken into account in making intelligent economic choices—the rela-

tive costs of labor, of capital installations of heating equipment (which also indirectly use energy), the relative comfort and convenience of alternative methods of satisfying needs, the use of other scarce materials, and the damage to the environment. The only sensible common denominator for these various costs is the dollar: provided there are no major distortions in the price tags placed on these various elements of cost, it is the total dollar costs, not just the btu's that should be compared.

Moreover, I do not believe it is the proper function of a public utility regulator to tell people that they cannot have things for which they are willing to pay the price. It is our responsibility to see that prices reflect costs—all relevant social costs; it is our responsibility also to persuade and educate consumers to make intelligent choices. But I do not conceive it as our responsibility to tell people that they may not have something for whose total marginal social costs they are willing to pay: regulators are all too prone to substitute their judgments of what is good for people for the judgments of the people themselves.

For these reasons, it is only with the greatest reluctance that I go along with a policy that denies one competitor the right to advertise his wares, while leaving another free to do so, because we do not think customers should be encouraged to use electric resistance heating.

2. I do so, additionally, because the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity is the heat pump; but installation of a heat pump means also installation of central air conditioning. To this extent, then, the promotion of off-peak electric space heating involves, in effect, the promotion also of on-peak summer air conditioning.

Once again, my espousal of free consumer choice as a general principle would require me to regard such a development with equanimity—were it not for the fact that the price of electricity to most consumers in the state does not fully reflect the apparently much higher marginal social costs of on-peak consumption in summer peaking markets. Until each consumer individually confronts a marginal cost-based, time-of-consumption rate, consumption on peak, with its large marginal use of oil-fired generation, is artificially subsidized.

If, then, the uncontrolled promotion of electric heating means the installation of heat pumps, which mean, in turn, more central air conditioning, the use of which is not charged its full marginal costs, the result is inefficient subsidization of consumption on peak, and higher rates for all consumers.

3. There are, of course, some electric companies in the state whose peaks fall in the winter rather than in the summer. It would seem that these might be permitted to promote, at least where there is a reasonable basis for believing the effect will be to stimulate sales off peak, improve their load factors, and therefore benefit all customers (provided the rates for the promoted service cover long-run incremental costs). But until we have ascertained in our generic electric rate proceeding (C.26806) whether the proper costing entity for marginal cost-based time-of-day rates is the individual company or the state system as a whole, such a relaxation of our ban opens up the possibility that, by permiting upstate, winter-peaking companies to promote summer air conditioning, we may in effect be encouraging a greater expansion of capacity for the State as a whole, which is summer peaking, than would other-

wise be desirable. To put it another way, if the proper costing entity is the State rather than the individual company, the marginal costs of summer sales may be much higher than of winter sales even in winter-peaking markets. Until we have resolved these costing questions, there is a danger that permitting individual companies to promote sales off their own individual peaks will in effect involve uneconomic subsidization of those sales.

I do not regard flat prohibitions of promotion by public utility companies abhorrent as a matter of principle. Where a company enjoys something close to monopoly, conferred upon it by public franchise, it does not in my judgment have an unfettered right to advertise. This is particularly so because merely disallowing such expenditures in setting rates, under the glib assumption that these costs will then be borne by stockholders rather than ratepayers, is something of a sham, for reasons I have already set forth.

Nuclear advertising

This last observation applies with particular force to the Commission's decision here to disallow the costs of advertisements publicizing company management views in favor of nuclear power. If electric company executives continue to feel that nuclear energy is in the best interest of their ratepayers, they are likely to continue to feel a responsibility for publicizing that fact. (And, for reasons we have already set forth in our Rochester Gas & Electric and Long Island Lighting Company decisions on this subject, decisions that the Commission majority reverses today, I would not wish them to refrain.) Since we set our allowance for return on equity at something close to the minimum cost of capital, and most companies in the

state are in any event earning something short of that amount, any continuation of such "disallowed" expenditures by utility company managements would in principle require us to raise the return on equity allowance correspondingly. In these circumstances, telling companies to put certain expenditures "below the line" comes out either to telling them to stop making the expenditures entirely, or is essentially cosmetic—and a trifle insincere.

I would have been happy to go along with the resolution of this dilemma proposed by Commissioner Berlin to the RG&E and LILCO cases—namely that utility companies be required to provide equal support for the presentation of opposing viewpoints. A reading of the responses to our call for comments on this subject persuades me, however, that his proposed requirement would expose us to endless litigation; I reluctantly conclude that its administration would be simply impractical.

In these circumstances, my own preference would be to extend the modest lump-sum allowance we have decided to provide for *institutional* advertising to cover discussions of general public policy issues such as the desirability of nuclear power as well. The logic, I suggest, is the same: company managements are likely to feel a continued obligation to present their views on the merits of nuclear energy; they are likely to feel that this is in the interest of their ratepayers, possibly more than their stockholders (who hardly benefit when companies must sell stock below book value in order to finance these extremely costly plants); and I would be inclined to agree.

Following this same reasoning, I repeat my extreme satisfaction at the Commission's resolution of the issue of institutional advertising. Our decision here is both sensible and non-ideological. We decline to cater to the vulgar

view, often demagogically expressed, that public utility companies have no right to communicate with their customers, or to answer the often unjust criticisms to which they are subjected, and that if they wish to do so, the expenditures should be placed "below the line"—an expedient that is in my judgment something of a sham.

ANNE F. MEAD, Commissioner, dissenting in part:

I concur, with one exception, in the statement of policy issued this day on advertising and promotional practices of public utilities.

The one exception is the area of institutional advertising which is designed to create, enhance or sustain the corporate image of the utility or which indulges in self-congratulation or self-admiration of the utility or its accomplishments. In my opinion these advertisements should not be allowed as an operating expense in any rate schedule proceeding or for rate making purposes.

The institutional advertising which I describe above is not in my opinion a necessary or proper expense in providing utility service. At a time when utility rates are increasing beyond the ability of many to pay, any expense, no matter how small, that is not necessary or beneficial to the consumer should not be allowed for ratemaking purposes.

Appendix F

Order of the Public Service Commission of the State of New York, February 25, 1977

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on February 17, 1977.

COMMISSIONERS PRESENT:

Alfred E. Kahn, Chairman[1]
Edward Berlin, Deputy Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead[1]
Charles A. Zielinski

Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices.

ORDER IMPLEMENTING CERTAIN RESTRICTIONS ON UTILITY ADVERTISING

(Issued February 25, 1977)

BY THE COMMISSION:

In our Policy Statement on Utility Advertising issued this date, we stated that certain changes should be made in existing orders on that subject. The purpose of this Order is to place those changes into effect. The Statement of Policy contains a full explanation of these changes and our reasons for adopting them.

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[1] Chairman Kahn and Commissioner Mead filed separate statements dissenting in part to the Statement of Policy which this Order implements. Their statements are appended to the Statement of Policy issued this date.

Appendix F

With respect to advertising by gas utilities, we will order those companies to discontinue direct contact with *potential* customers for the purpose of encouraging installation of dual-fuel equipment.[1] Further, we shall direct gas utilities to discontinue promotional activities designed to retain existing customers at previous levels of consumption, except in those limited instances where gas companies are permitted to attach new residential load to offset a decline in firm load.

In addition, we shall, for the reasons set forth in the Statement of Policy, order all utilities to discontinue the practice of utilizing bill inserts as a mechanism for the dissemination of a utility's position on controversial matters of public policy.

The Commission orders:

1. All gas companies shall: (a) discontinue direct contact with potential customers for purposes of encouraging installation of dual-fuel equipment, and (b) discontinue promotional activities designed to retain existing customers at previous levels of consumption unless authorized to attach new residential load.

2. All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

[1] Of course, gas companies may, and indeed are, urged to encourage *existing* gas customers to install alternate fuel equipment.

Appendix G

Order of the Public Service Commission of the State of New York Denying Petitions for Rehearing, July 14, 1977

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 6, 1977

COMMISSIONERS PRESENT:

Edward Berlin, Acting Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Charles A. Zielinski

Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices.

ORDER DENYING PETITIONS FOR REHEARING

(Issued July 14, 1977)

BY THE COMMISSION:

On February 25, 1977, we issued our Policy Statement on Utility Advertising announcing certain changes in our treatment of this subject. Specifically, we stated: (1) that gas utilities should discontinue direct contact with potential customers for the purpose of encouraging installation of dual-fuel equipment and (2) that all utilities should discontinue the practice of using bill inserts as a mechanism

for the dissemination of a utility's position on controversial matters of public policy. By Order issued the same day, these changes were put into effect.

Petitions for rehearing have been received from the Consumer Protection Board (CPB), Central Hudson Gas & Electric Corporation, Columbia Gas of New York, Inc., Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation, New York Telephone Company, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation. Replies to exceptions have been filed by the CPB and the Natural Resources Defense Council, Inc., *et al.*

PROMOTIONAL ADVERTISING

Central Hudson excepts to our decision to continue the existing prohibition of promotional advertising by both electric and gas companies. The utility contends that under *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), commercial speech is protected by the guarantees of the Bill of Rights and, therefore, our restriction on promotional advertising is void. This case involved a Virginia statute which provided that a pharmacist is guilty of unprofessional conduct if he advertised the price of any prescription drug. There is no contention here that commercial speech falls outside the scope of the First Amendment. But this does not mean that commercial speech may never be regulated.

In *Virginia State Board of Pharmacy*, the Court could find no legitimate State interest in restricting the dissemination of pricing information to the public. A much different situation exists here. The rates of electric utilities in this State continue to rise. The need for such increases

derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. Moreover, when national policy requires energy conservation, the promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary. This is especially true since the utilities in this State are expected to promote conservation by their customers.

While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent with the public interest,[1] even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources.[2] This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply.

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[1] Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

[2] We distinguish here between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consumption during off-peak hours. It is the latter that we proscribe here.

Appendix G

An additional area of legitimate State interest was pointed out by Chairman Kahn in his separate statement. The uncontrolled promotion of electric heating most likely means the installation of heat pumps, since they are the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity; but installation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers. The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy*.

Our Statement recognized, however, that some companies have peaks occurring in the winter. To the extent rates cover long-run incremental costs for those companies, there is reason to believe that the promotion of off-peak sales may improve their load factors and benefit their customers. But, as former Chairman Kahn pointed out, before we know that this actually is the case, we must first ascertain whether the proper costing entity for marginal cost-based time-of-day rates is the individual company or the State system as a whole,[1] since if we allow winter-peaking companies to promote summer air-conditioning, we may be encouraging a greater expansion of capacity for the entire

[1] This question is at issue in Case 26806 (Generic Electric Rate Proceeding). A decision is expected presently.

Appendix G

State, which as a whole is summer-peaking, than would be necessary or desirable.[1]

It is clear, therefore, that there are ample grounds here for regulation of commercial speech. Manufacturers and dealers, whom we do not regulate, remain free to promote the use of electric equipment and appliances. Such advertising will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives.

Columbia Gas specifically objects to our decision to extend the ban on promotional activities by gas utilities to include direct contact with potential customers for the purpose of encouraging installation of dual-fuel equipment. Columbia Gas argues that this additional restriction is unnecessary since the Commission now exercises total control over the expansion of its market. Under existing restrictions it cannot take on new customers and it must inform potential customers that it has no gas available for their use. Our new restriction, the company argues, denies it the possibility of obtaining new business if, and when, the natural gas supply situation improves and the company is authorized to take on new customers.

The specific purpose of our Order was to reduce the demand for gas. It would be inconsistent with this aim to permit a gas utility to promote the attachment of potential customers. In accordance with our past policy, however, we are prepared to modify, or even remove, this restriction upon a clear showing that the company has firm supplies of gas sufficient for it to engage in some limited pro-

[1] Expressed another way, if the proper costing entity is the State rather than the individual company, the marginal costs of summer sales may be much higher than of winter sales even for winter-peaking markets.

motional activity without lessening the supply of gas available to existing customers.

Political Advertising

Central Hudson also argues that our prohibition on the recovery through rates of expenditures for political advertising somehow violates its Constitutional rights. To support this claim, the company relies on *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U.S. 64 (1934) and *Virginia State Board of Pharmacy, supra.* Both cases, however, are inapposite. First, unlike the *Virginia* case, we are not prohibiting the company from expressing its position on matters of public controversy. We are simply not permitting a utility to pass along to its ratepayers the costs involved in publicizing its political views. *West Ohio* stands for the proposition that advertising is a legitimate business expense and, therefore, a reasonable allowance should be provided for this activity. It does not require a dollar-for-dollar reimbursement to the company for any and all expenses incurred.

Bill Inserts

Every utility filing a petition has alleged that our decision to prohibit the use of bill inserts to publicize its views on matters of public controversy violates the First Amendment and, in addition, is too vague. We reject these contentions.

First we think it pertinent that our prohibition in no way attempts to prohibit the companies from making their views known. But use of the bill insert for this purpose is, in our judgment, improper since it gives a utility a unique and undue advantage in publicizing its position. The utility's billing records make available a selectively

chosen target audience. Any material that is enclosed with a bill will be received by the customer since he has no alternative but to pay the bill if he desires continuation of his utility service. While it is up to the customer whether to read the matter contained in bill inserts, utility management obviously has a unique vehicle for getting its material into its customers' hands.

If the bill insert is turned into a mechanism to promote the management's views on controversial issues, the unique advantage of the billing mechanism is then transformed into a device for presenting only one side of this issue. We believe that this confers an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views. Our previously announced ban on controversial material in bill inserts is to preserve the insert for matters that are not merely presentations by partisans on one side of a debate but which contain useful information on topics that are not controversial. In addition to the undue advantage conferred on management, there are several other factors that we also consider important.

The bill insert is not only a unique medium of communications, it is also quite limited: (1) the size and weight of the insert, in principle, should be such that it will fit in an envelope with the bill without increasing the weight of the total package so much as to require additional postage costs; and (2) an insert can be used only so often as a bill is sent by the utility company, usually once a month, but in many cases only once every other month. These limitations mean that utility companies could easily use up much of the scarce resource of bill insert communication by soliciting support for the industry's position on controversial public issues. Bill inserts can, and, in our view, should

be used primarily to convey information that is clearly helpful to consumers, such as practical steps that individuals can take to conserve energy. Our prohibition assures preservation of the latter public interest objective.

Since utilities have monopoly franchises conferred by the government, no other person or entity can provide utility service and thereby gain the wide, captive audience for bill inserts enjoyed by them. This makes the utility bill insert medium analogous to the limited radio spectrum, whose use is properly regulated by the government (specifically the Federal Communications Commission), to assure that those who are given the privilege to use limited spectrum space for the operation of radio and television stations act as trustees of the public interest.

Broadcasters, of course, are not precluded from airing their opinions. Indeed, they are encouraged to do so. But, they are required, by the FCC's "fairness doctrine" to present contrasting views on controversial public policy issues, because there simply is not enough spectrum space available to allow everyone with a unique point of view to operate a radio or television station. Since the same limitation is pertinent to utility bill inserts, we considered imposing something like a "fairness" or "equal time" requirement on the companies: if a utility stated its position on a controversial issue in a bill insert, it would have to give an organization with an opposing viewpoint a chance to disseminate its opinion as an insert with the utility's bill. While some of us preferred this approach, we were all convinced ultimately that it would be difficult to administer fairly,[1] and would tend to lessen undesirably the number of bill inserts dealing directly with such useful

[1] We note that no utility company has submitted to us a proposal for handling controversial issues in bill inserts in this manner.

and uncontroversial information as consumer conservation measures.

It is for these basic reasons that we adopted our ruling. And it does not contravene the utilities' rights of free speech or press. Utility bill inserts are not newspapers which, in principle, any person is free to publish and thereby make his opinions known to the public. The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.

We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

The goal of free speech and of a free press is a well-informed electorate capable of making sound pubic policy decisions. Our ruling does not diminish to any substantial degree the utitities' ability to contribute to that goal. It does, however, preclude their monopolizing the unique utility bill insert medium.[1]

[1] We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood* v. *District Board of Education,* 45 U.S.L.W. 4473 (1977).

Appendix G

The petitioners also argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.

In the Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through future advisory determinations. One such determination was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and therefore should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to seek it. We will resolve any request expeditiously so that no undue delay will result.

Con Edison also states that under the Constitution, the field of postal regulation has been preempted by the Federal government. Claiming that our decision on bill inserts is such an interference with the mails, the company argues, therefore, that we have acted illegally. This argument is specious. Our prohibition involves neither direct physical interference with Federal postal activities nor a direct immediate burden on the performance of postal functions. Our Order is in no way an interference with the Federal regulation of the mails. See *Railway Mail Assoc.* v. *Corsi*, 326 U.S. 88 (1945).

Appendix G

OUT-OF-STATE POLITICAL CONTRIBUTIONS

We restated in the Policy Statement our longstanding position that political advertising will not be considered a legitimate cost of doing business. Any such expenditures must be recorded below the line. See *Complaint of Grassroots Action, Inc.*, 13 NY PSC 630 (1973); *Statement of Policy on Advertising and Promotional Practices by Public Utilities*, 12 NY PSC 108-R (1972); *Accounting for Donations, Dues and Lobbying Expenditures*, 7 NY PSC 9-R (1967).

CPB is dissatisfied, however, and argues that out-of-state political contributions should be banned completely, claiming that any connection between out-of-state political actions and the New York operations of a utility is too remote.

In *Grassroots*, we considered the issue of political contributions by utilities and held that, as long as these expenditures are minor, so that they have little or no effect upon a utility's financed stability, we will give our general consent and approval as required by Section 107 of the Public Service Law for nonutility-related expenditures. We stated that to require prior approval for each expenditure before a utility could speak out in the public forum on matters which could affect it would be undesirable. We see no reason to depart from this general policy even when out-of-state expenditures are involved.

PERCENTAGE LIMITATION ON ADVERTISING EXPENDITURES

New York Telephone argues that our guideline limitations on institutional and informational advertising[1] would

[1] The phrase "and informational" was inadvertently omitted from the last line of footnote 1 on page 13 of our Statement. The last line of that footnote should read "institutional and informational advertising allowance on brief."

result in significant reductions in reasonable advertising expenditures. The company argues that we erred in making no distinction among the various types of advertising that fall within these broad categories. For example, legally required notices and purely informational advertising, *i.e.*, notification of emergency procedures or changes in billing practices should fall outside the scope of our guideline limitations.[1]

NYT also claims that the ceiling on advertising expenditures imposed by our Guidelines serves no useful purpose since staff must still determine whether any particular advertisement is political or self-serving. In any event, the company points out the entire lump sum allowance may still be questioned in a rate proceeding.

We recognized that our new policy would not solve all the problems relating to advertising. It is, however, an improvement over our past practice of conducting an item-by-item examination and evaluation of past advertisements—a practice which took valuable staff time, time which could be far better used checking on other, quantitatively larger expense items. What we are doing here is establishing a relatively simple procedure to determine a reasonable allowance for future institutional and informational advertising. We intend to monitor the results of this new policy and to make any modifications necessary in light of this experience. We also recognize that expenses associated with legally required advertising vary depending on the territory served by the utility. We are prepared, therefore, to take such differences into account in applying our Guidelines to individual companies.

[1] The company estimates that 1977 expenditures for informational and institutional advertising will exceed $4 million, including $600,000 for legally required notices. Under strict application of our Guidelines, only $1,635,000 would be recoverable from rates.

CONCLUSION

We have reviewed the petitions for rehearing filed in response to our *Statement of Policy on Advertising and Promotional Practices of Public Utilities* and conclude that they present no new arguments of fact or law which warrant modification of our Statement. The petitions are, therefore, denied.

The Commission orders:

1. The petitions for rehearing filed by the parties listed in the Appendix to this Order in response to our *Statement of Policy on Advertising and Promotional Practices of Public Utilities* and accompanying Order, issued February 25, 1977, are denied.

2. This proceeding is closed.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

APPENDIX

Parties Filing Petitions for Rehearing

Central Hudson Gas & Electric Corporation
Columbia Gas of New York, Inc.
Consolidated Edison Company of New York, Inc.
New York State Electric & Gas Corporation
New York Telephone Company
Niagara Mohawk Power Corporation
Rochester Gas and Electric Corporation
Consumer Protection Board

Appendix H

Notice of Appeal to the Supreme Court of the United States, June 26, 1979

SUPREME COURT
OF THE STATE OF NEW YORK

County of Albany

Albany County Clerk's Index No. 11163-77

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

for a judgment pursuant to Article 78 of the CPLR,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Consolidated Edison Company of New York, Inc., the Petitioner-Plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York entered in the above special proceeding and action on May 1, 1979, affirming the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department. The order of

Appendix H

the Appellate Division reversed the judgment of the Supreme Court, Albany County, and declared constitutional an order of the Public Service Commission of the State of New York prohibiting utilities, including Petitioner-Plaintiff, from utilizing bill inserts as a means of disseminating their views on controversial matters of public policy. The judgment of the Supreme Court, Albany County, annulled, declared unconstitutional, and permanently enjoined enforcement of said order of the Public Service Commission of the State of New York.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Yours, etc.,

/s/ JOSEPH D. BLOCK
JOSEPH D. BLOCK
PETER P. GARAM
4 Irving Place
New York, New York 10003
(212) 460-2777
Attorneys for Petitioner-Plaintiff
Consolidated Edison Company of New York, Inc.

Dated and Entered:
June 26, 1979
Office of Albany
County Clerk
Albany, N. Y.

To:

Clerk of the Supreme Court, Albany County
Albany County Courthouse
Albany, New York 12207

PETER H. SCHIFF, Esq.
Counsel to the Public Service
Commission of the State
of New York
Empire State Plaza
Agency Building #3
Albany, New York 12223

Appendix H

CERTIFICATE OF SERVICE

I, Peter P. Garam, one of the attorneys for Petitioner-Plaintiff herein, hereby certify that on the 26th day of June, 1979, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Public Service Commission of the State of New York, Respondent-Defendant herein, by depositing same in a United States mailbox, with first class postage prepaid, addressed to Peter H. Schiff, Esq., Empire State Plaza, Agency Building #3, Albany, New York 12223, Counsel to the Public Service Commission of the State of New York.

All parties required to be served have been served.

/s/ PETER P. GARAM
PETER P. GARAM
4 Irving Place
New York, New York 10003
(212) 460-2985
Attorney for Consolidated
Edison Company of New York, Inc.